

- (2) Was claimant overpaid for temporary total disability benefits and is respondent entitled to a credit?
- (3) Has claimant failed to prove he is entitled to receive permanent partial disability benefits in excess of a functional impairment as a result of his status as an illegal alien, not possessing a valid Social Security number or working visa?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was originally noticed for regular hearing on July 8, 1997. At that time, the attorneys for the claimant and the respondent appeared before Administrative Law Judge Kenneth S. Johnson in Garden City, Kansas. Claimant, however, failed to appear for the hearing. Claimant's attorney speculated that claimant may be in Mexico. The Administrative Law Judge continued the matter, advising that at the next regular hearing they would proceed regardless of claimant's attendance.

Contained in the administrative file is an Amended Notice of Regular Hearing, rescheduling the regular hearing in this matter for April 28, 1998, at 9:00 a.m. in Garden City, Kansas. However, there is no transcript of regular hearing from that date in the file. There is contained in the file a pre-trial stipulation form, which answers the various issues raised in K.A.R. 51-3-8. Respondent's attorney advised that the pre-trial stipulation form was prepared by him in anticipation of the regular hearing. Claimant's attorney, however, denied any knowledge of this form and represented that he did not have a copy of the form in his file. Claimant's attorney further refused to agree to the information contained in the pre-trial stipulation form.

K.A.R. 51-3-8(b) requires that an informal pre-trial conference be held in each contested case before testimony is taken. At this conference, the regulation requires that the administrative law judge **shall** determine from the parties what issues have not been agreed upon. If the issues cannot be resolved, the stipulations and issues **shall** be made a part of the record. As there is no transcript of regular hearing showing what may or may not have been stipulated to, and as the parties cannot agree to the pre-trial stipulation form, the record does not verify that a pre-trial conference was held, as required.

In addition, a significant dispute exists regarding claimant's legal status in the United States. Respondent contends claimant is an illegal alien, not possessing a valid Social Security number or working visa and, therefore, not entitled to work disability benefits beyond his functional impairment. Claimant argues no such evidence exists in the file regarding claimant's legal status. There is, however, contained in the file a mediation review report dated February 28, 1996, which discusses claimant's lack of a valid Social Security number and working visa. In addition, the pre-trial stipulation form mentions that it was determined, during the vocational rehabilitation process, that claimant was an illegal

alien and should not have been receiving benefits. The attorney for the claimant objected to the admissibility of these documents.

The Appeals Board notes that, should the pre-trial stipulation form be excluded from consideration, then there is nothing in the file regarding what stipulations may have been entered into by the parties under K.A.R. 51-3-8. Not only does this eliminate the discussion regarding claimant's legal status, but also dissolves any stipulations regarding claimant's accident and its relation to his employment with respondent. Since claimant did not testify in this matter, certain of these stipulations are essential to claimant's case.

The Appeals Board, therefore, remands this matter to the Administrative Law Judge in order that the parties may be presented the opportunity to resolve any issues which can be agreed upon, and the record clarified regarding what issues remain in contention. The parties may then, if necessary, proceed to regular hearing pursuant to K.S.A. 1997 Supp. 44-523.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that this matter shall be remanded to the Administrative Law Judge for further proceedings consistent with this order. The Appeals Board does not retain jurisdiction of this matter, and if the parties wish to dispute any subsequent findings or orders by the Administrative Law Judge, the appropriate appellate procedures must be followed.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert A. Levy, Garden City, KS
 D. Shane Bangerter, Dodge City, KS
 Pamela J. Fuller, Administrative Law Judge
 Philip S. Harness, Director